No. 82-651

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1982

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WALTER RICE, Individually and as Director of The Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

EVA [redacted],

Respondent,

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On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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# BRIEF OF THE TULALIP AND MUCKLESHOOT INDIAN TRIBES AS AMICI CURIAE

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# BRIEF OF THE TULALIP AND MUCKLESHOOT INDIAN TRIBES AS AMICI CURIAE

This brief is submitted with the written consent of all parties, and in support of the Respondent, Eva Rehner.

## INTEREST OF AMICI

The Tulalip and Muckleshoot Tribes have been in litigation with the State of

Washington over the extent of state jurisdiction to regulate tribal liquor transactions within their reservations. Their interest in the disposition of Rice v. Rehner is obvious.[1]

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[1] After the Ninth Circuit decision in Rehner v. Rice, the State of Washington negotiated a settlement with the Muckleshoot Tribe which allows the Tribe to continue to sell liquor on its reservation, even though Washington is a "monopoly" state. The settlement also allows the tribe to sell a pre-set quota of liquor subject only to tribal and federal taxation. Since the settlement may be terminated after five years or upon the breach of certain conditions, the Muckleshoot Tribe still has an interest in the outcome of this case.

The Tulalip Tribe is still assessing the extent to which similar or other settlement terms would meet its governmental objectives in undertaking comprehensive regulation of liquor transactions on its reservation. The Tulalips' claims against the State of Washington are still pending. The Muckleshoot claims have been voluntarily dismissed, without prejudice.

The Muckleshoot settlement is particularly significant in light of Cali-

Because there are certain legal issues common to the Rehner case and the Tulalip and Muckleshoot cases, the Ninth Circuit Court of Appeals consolidated them for argument and issued a joint decision. There are, however, significant differences between the cases. Issues which were not presented by Rice v. Rehner but were presented by the Tulalip and Muckle-

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fornia's assertion that states must have complete authority over liquor transactions on Indian reservations to prevent chaos, and that the term "substantive standards" is too ambiguous to apply. The fact that at least one settlement has been reached in light of the Ninth Circuit ruling, demonstrates that workable arrangements for tribal/state cooperation can be found without subjecting tribes to the full panoply of state liquor laws and jurisdiction. It should also be noted that the Muckleshoot and Tulalip Tribes have been operating their own liquor regulatory systems for over four years now, without any apparent confusion over which state laws the Washington district court considered to be substantive standards nor any accusations that the tribes are violating the district court's order.

shoot cases are now before a district court in Washington. Those issues must await the development of a complete factual record, and full briefing and argument before they can be fairly decided. Furthermore, the state and tribal regulatory schemes involved in the Tulalip and Muckleshoot cases are different from those involved in Rehner. These differences raise some additional considerations not presented by Rehner.

The purpose of this brief is not only to argue in support of Eva Rehner on the common issues which were decided favorably to the tribes by the Ninth Circuit, but also to explain the similarities and differences between the two cases, and to alert the Court to the limits of the issues now before it.

## ARGUMENT

### I. Similarities and Differences Between Rice v. Rehner and the Washington Cases.

Both the California case of Rice v. Rehner and the Washington cases involving the Tulalip and Muckleshoot tribes questioned whether 18 U.S.C. 1161 authorizes state jurisdiction over the licensing of Indian liquor vendors in Indian country.[2]

The Ninth Circuit Court of Appeals, like the Tenth Circuit before it in United States v. New Mexico, 590 F. 2d 323 (1978), cert. den. 62 L. Ed. 2d 42, properly ruled that neither the Twenty-first Amendment nor 18 U.S.C. §1161

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[2] Neither case involves a dispute over whether the acts or transactions in dispute occur in Indian country.

extended state jurisdiction to Indians distributing liquor on their reservations. The extensive history of federal preemption in regard to reservation liquor transactions, the history, purposes, and prior judicial interpretations of the Twenty-first Amendment and 18 U.S.C. §1161, and the applicable rules of construction all compelled that conclusion. See, e.g., United States v. Sutton, 215 U.S. 291, 295-296 (1909); Hallowell v. United States, 221 U.S. 317, 323 (1910); United States v. State Tax Commission of Mississippi, 421 U.S. 599, 613-614 (1975); Collins v. Yosemite Park and Curry Co., 304 U.S. 518, 538 (1938); United States v. Mazurie, 419 U.S. 544, 555-557 (1975); Bryan v. Itasca County, 426 U.S. 373, n. 2, 388-390, n. 14, 392 (1976). In regard to the licensing issues now before this Court, the Tulalip

and Muckleshoot Tribes contend that this Court's decision in Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), is dispositive. As discussed more fully in the next section, the Court ruled in that case that, absent express Congressional authorization, states have no authority to require licenses and license fees from Indians operating businesses on their reservations.

If the Court affirms the Ninth Circuit on this point and rules that 18 U.S.C. 1161 did not grant states authority to exact licenses and fees from Indian liquor retailers on reservations, that would dispose of the licensing issues common to all three cases. However, if the Court rules against Eva Rehner on the common licensing issue, the Tulalip and Muckleshoot Tribes would expect to have a full opportunity to present evidence on

and argue the aspects of their cases which are not presented in Rehner and are not ripe for decision by this Court.

Unlike Rice v. Rehner, the two lawsuits from Washington State present a question of state licensing authority over tribal governments, not an individual tribal member. Even when Congress has expressly authorized state jurisdiction over reservation Indians, this Court has refused to infer an intent to extend state jurisdiction over tribal governments. Bryan v. Itasca County, Minnesota, 426 U.S. at 389. The intrusions upon tribal sovereignty which state jurisdiction over tribes qua tribes represents is of course an even more serious matter in light of the unique history of federal/tribal relationships. It is clearly not the sort of alteration in Indian country jurisdictional rela-

tionships that one would expect to occur without a careful discussion in the legislative history of its full ramifications, including, for example, the unique enforcement problems raised by the sovereign immunity of tribal governments. See Puyallup Tribe v. Washington Game Department, 433 U.S. 165, 170-172 (1977); Kennerly v. District Court, 400 U.S. 423, 427 (1971).

Furthermore, the Washington cases do not present simply a question of state licensing authority over reservation Indians. The precise issue in those cases is not whether the state can require a license and fees from reservation Indians under 18 U.S.C. 1161 as a precondition to selling liquor. The issue is whether a state, not otherwise "dry", can effectively preclude tribal regulation of liquor distribution by

absolutely prohibiting sales other than through state stores, or by state agents.

Unlike California, Washington State has a monopoly system of liquor distribution. Prior to its settlement with the Muckleshoot Tribe, Washington refused to allow anyone other than state liquor board employees, state agents, and persons employed in national parks or on military reservations, to sell liquor. The issue raised by the Tulalip and Muckleshoot cases is therefore a significantly different one. In 18 U.S.C. 1161, Congress clearly intended that tribes would be able to exercise their regulatory authority over liquor distribution in Indian country. United States v. Mazurie, supra. The question raised in Washington is whether any authority Congress granted states in 1161 extends so far as to allow a state to displace

tribal authority totally in order to protect its own liquor business monopoly. The potential abuses and dangers inherent in allowing a state's interest in its own economic ventures to dictate how tribal governmental activities on Indian reservations will be regulated are apparent. They have been noted previously in judicial decisions. See, e.g., Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655, 664 (9th Cir. 1975), cert. den. 429 U.S. 1038; Bryan v. Itasca County, 426 U.S. at 388 n. 14.

The record developed so far in the Tulalip and Muckleshoot cases suggests that Washington State has not been so concerned with state regulatory authority as with protecting a state business monopoly. See, e.g., State of Washington's Legislative Budget Committee's Performance Audit of the Liquor Control

Board, Rept. No. 78-13 (December 15, 1978) ["The major portion of available organization resources and management attention of (Liquor Control) Board personnel has been devoted to the merchandising of liquor for profit."][3]

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[3] See also, Joint Brief of Appellees, Ninth Circuit Nos. 79-4403, 4404, Addendum D-G. For example, on February 23, 1977 a board member reported to the State House Appropriations Committee, as follows:

> "Thus, you can see that the Liquor Control Board operates a very real business. It administers one of the largest wholesale and retail operations in the state, and, hence, must be looked upon as a business enterprise. . ."

A few days later, he added in a letter to the Washington House Appropriations Committee that:

> "We are concerned that failure to meet the public demand for more outlets may spawn a new initiative effort to turn the liquor business completely over to private enterprises at a loss of millions of dollars in liquor profits which help support state and local governments."

Finally, unlike Rice v. Rehner, the Washington cases raise questions regarding state taxing authority over liquor transactions in Indian country. The Ninth Circuit Court of Appeals did not decide whether Washington State could require the Tulalip and Muckleshoot Tribes to collect state taxes on sales to non-members, but remanded the tax issues to the district court, which had not previously considered these issues, for presentation of evidence, briefing and argument. Issues of state taxing authority have not been raised in the Rehner case. Therefore, the Washington district court may have the first opportunity to decide the issue, expressly left open by this Court in Washington v. Confederated Tribes, as to whether state tax collection requirements would be preempted by a tribe's exercise of

federally delegated power under 18 U.S.C. 1161. See, Washington v. Confederated Tribes, 447 U.S. 134, 156 (1980). See also, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 73 L. Ed. 2d 1174 (1982).[4]

In presenting evidence to the district court on this point, the Tulalip Tribes intend to show that Washington State has developed other less burdensome mechanisms for collecting liquor taxes from purchasers buying liquor at points beyond the state's jurisdiction and that imposing tax collection requirements on the tribe would unlawfully discriminate against it. Other examples of points

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[4] The State of Washington has abandoned any claim to taxation authority over liquor sales to tribal members in Indian country.

which will have to be litigated before the tax issues can be decided are whether the tribe is, in fact, simply "marketing" a state tax exemption, or is providing a conveniently located liquor distribution center to reservation residents, employees, and persons living in near proximity; and whether the tribe is entitled to a tax credit for the tribal taxes it collects.[5] The tribes also contend that, in light of the compre-

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[5] Not only does Washington State have a strong business interest in its monopoly system, it exacts some of the highest liquor taxes in the country. Although it distributes part of the revenue from these taxes to other local governments to be used in delivering their services, none of the state tax revenue or business profits are distributed to tribal governments. Rehner v. Rice, 628 F. 2d 1340, 1342-1343 (9th Cir. 1982). The Tulalip and Muckleshoot Tribes have claimed that, without an immunity or deduction from state taxes, they will be placed at a distinct competitive disadvantage in trying to raise tax revenue from liquor distribution to non-member residents

hensive federal scheme regarding liquor transactions with any Indian in Indian country, it is inappropriate to distinguish tribal members and non-member Indian residents of the reservation for purposes of state jurisdiction over liquor matters. Cf. Washington v. Confederated Colville Tribes, 447 U.S. at 161.

II. Congress Has Not Granted States Licensing Authority Over Reservation Indians Selling Liquor In Indian Country

While the Tulalip and Muckleshoot

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and employees on the reservation and in nearby areas. In effect, the state liquor stores would be able to market to those purchasers an exemption from tribal taxes, even though they may receive substantial services from the tribes. The tribes would consequently lose a significant portion of the revenue on which they depend in order to deliver important governmental services and finance their own liquor regulatory systems.

cases presented rather complex issues, the single issue presented by Rice v. Rehner is straightforward. The question is whether 18 U.S.C. 1161 constitutes Congressional authorization for state licensing authority over reservation Indians.

The rule is well-settled that, absent express statutory authorization to the contrary, Indian retailers in Indian country do not have to obtain state licenses or pay state fees before they can transact business. Moe v. Salish & Kootenai Tribes, 425 U.S. at 480-481. California makes the same arguments on the licensing issue that were made and rejected in Moe. As explained by Justice Rehnquist for the majority in Moe:

> In McClanahan this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the

reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes "which define the limits of state power." Reading them against the "backdrop" of the Indian sovereignty doctrine, the Court concluded "that Arizona ha(d) exceeded its lawful authority" by imposing the tax at issue.

In Mescalero, the companion case, the import of McClanahan was summarized:

> "(I)n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."

Aligning itself with the dissenting opinion below, the State first seeks to avoid McClanahan on two grounds: (a) the manner in which the Flathead Reservation has developed to its present state distinguishes it from the Navajo Reservation; (2) there does exist a federal statutory basis permitting Montana to tax.

* * *

> As to the second group, we note that the State does not challenge the District Court's overall conclusion that the treaty and statutes upon which the Tribe relies in asserting the lack of state taxing authority "are essentially the same as those involved in McClanahan." We agree, and it would serve no purpose to retrace our analysis in this respect in McClanahan.
>
> For these reasons, the personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions. McClanahan, supra, Mescalero, Apache Tribe v. Jones.

425 U.S. at 475-477, 480-481 (citations and footnotes omitted). The Supreme Court also affirmed the lower court's determination that federal law precluded application to a reservation Indian of

both the state license and license fee requirements. Id. at 468, 483. See, Moe, 392 F. Supp. 1297, 1307 (D. Mont. 1975).

Thus, in Moe, a penumbra of general treaty language and statutory provisions was sufficient to preclude state business licensing authority over reservation Indians in accord with the principles of state jurisdiction articulated in the McClanahan and Mescalero cases. The preemption argument is even more compelling in regard to liquor transactions. Compared to cigarette regulation, the degree to which the federal government has undertaken control over liquor in Indian country is far more extensive. Long before California and Washington became states, the federal government had begun exercising its plenary jurisdiction over liquor transactions involving

Indians. Moreover, Eva Rehner's liquor business is not only governed by specific federal statutes on the subject of liquor, but she had been licensed under special, comprehensive, federal licensing laws applicable to Indian reservations. See, Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965).

California's reliance on inherent state police powers and the Twenty-first Amendment to extend its jurisdiction into Indian country is misplaced. See, e.g., Collins v. Yosemite Park and Curry Co., supra; United States v. New Mexico, supra. Other than matters involving only non-Indians, this Court has never ruled that inherent state authority extends to Indian reservations. In regard to authority over reservation Indians, the Court has always assumed its absence unless Congress has explicitly provided

otherwise. See, Bryan v. Itasca County, 426 U.S. at 376, n. 2; Kennerly v. District Court, 400 U.S. at 427; United States v. Kagama, 118 U.S. 375, 381-382 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). See also, Dick v. United States, 208 U.S. 340, 353-358 (1908).

California does not claim that 18 U.S.C. 1161 constitutes express Congressional authorization for state licensing jurisdiction over reservation Indians. Instead, it offers a meaningless distinction between the exercise of state "jurisdiction" and the exercise of state "control," as a means of avoiding the well-settled rule regarding extensions of state jurisdiction over reservation Indians which the Ninth Circuit Court of Appeals carefully applied. In addition, California argues that the Congressional

desire to end discrimination against reservation Indians, in the form of prohibition on reservations, and thereby reward Indians for service in World War II (see, "Eliminating Certain Discriminatory Legislation Against Indians In the United States," H. Rep. No. 775, 83d Cong., 1st Sess., July 15, 1953), was, in fact, a termination of their special status under federal law. But, the special status of Indians vis-a-vis state jurisdiction is not the sort of "discrmination" Congress was concerned about in 1161. As pointed out by Justice Rehnquist in Moe, federal statutes which treat Indians differently in regard to state jurisdiction are not to be viewed as a form of improper federal discrimination but as a recognition of the special political status of Indians and their unique relationship to the federal

government. As to the claim that immunity from state licensing laws constituted "discrimination," which Congress would not have intended, Justice Rehnquist wrote:

> "Literally every piece of legislation dealing with Indian tribes and reservations. . .single(s) out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.A., would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.
>
> * * *
>
> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such lesgislative judgments will not be disturbed."

425 U.S. at 480. By seeking an end to prohibition in Indian country, Congress and tribes did not intend to effectuate

termination of the special federal relationship with tribes, in regard to liquor regulation.

Just as this Court refused to interpret Public Law 280 as a termination of the Indians' special status, so should it now refuse to accept California's argument that 18 U.S.C. 1161 was intended to subject reservation Indians to the full panoply of state liquor laws. See, Bryan v. Itasca County, 426 US. at 389-390; Menominee Tribe v. United States, 391 U.S. 404, 411 (1968). In fact, Felix Cohen, the well-known Indian law scholar, pointed out at the legislative hearings on the end of prohibition in Indian country that to condition it on a grant of state jurisdiction would not be a reward to the Indians but a dishonorable and unfair deal. See, Hearings before the Subcommittee on Indian

Affairs, House of Representatives, on H.R. 459, H.R. 3235, and H.R. 3624 (February 28 and 29, 1952). He said:

> . . .I am shocked at the tie up that the Indian Bureau now proposes between the drinking of liquor and the extension of State jurisdiction. . .

Id. at 45-46, 48. Felix Cohen urged that the end of prohibition on Indian reservations "should be done independently of any extension of state jurisdiction." Id. Accordingly, liquor provisions were removed from the Public Law 280 bill which was simultaneously being considered. California cannot now fairly contend that, under 1161, tribes can only open up their reservations to liquor traffic if they are willing to accept state liquor jurisdiction.

## SUMMARY OF ARGUMENT AND CONCLUSION

The Ninth Circuit Court of Appeals

followed the applicable, prior case law in interpreting the scope of 18 U.S.C. §1161 and the Twenty-first Amendment in regard to Indian liquor sales on Indian reservations. The State of California cannot bootstrap itself into a position of licensing authority over Eva Rehner, with the attendant power to deny that which has been permitted under a federally supervised regulatory scheme and to impose insurmountable financial burdens upon her.[6] California's purported distinction between "control" and "jurisdiction" cannot mask the fact that Congress did not expressly provide for

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[6] Just recently, this Court pointed out that the existence of federal supervision over a tribal regulatory system should substantially reduce opponents' fears of abuses and should make courts reluctant to encroach on tribal laws reviewed and approved through federal administrative processes. Merrion v. Jicarilla Tribe, 71 L. Ed 2d 21, 40-41 (1982).

state licensing authority over reservation Indians when it passed 18 U.S.C. §1161, but merely borrowed state substantive standards of conduct for purposes of future tribal/federal regulation. The concern which led to the adoption of the Twenty-first Amendment can be accommodated in this interpretation of 18 U.S.C. §1161. See, Rehner v. Rice, 678 F. 2d at 1348, n. 16.

The Ninth Circuit decision should accordingly be affirmed.

DATED this 24th day of January, 1983.

Respectfully Submitted,

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